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No. 97-1433

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

UIS, INCORPORATED,
Petitioner,

v.

INTERKAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD A. HANNAN
COUNSEL OF RECORD

HANNAN, SIESENNOP
& SULLIVAN
200 NORTH JEFFERSON STREET
MILWAUKEE, WI 53202
(414) 223-7900
ATTORNEY FOR PETITIONER

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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I. INTERKAL'S RESPONSE HIGHLIGHTS AN UNCERTAINTY WHICH GRANTING THIS PETITION WOULD CLARIFY: EFFECTIVELY DISTINGUISHING BETWEEN A PREPLEADING "LEGAL CERTAINTY" AND A POSTPLEADING "EVENT" FOR PURPOSES OF DETERMINING WHETHER THE JURISDICTIONAL AMOUNT IN CONTROVERSY HAS BEEN SATISFIED.

A. An Amended Pleading Cannot Cure A Prepleading Defect In Establishing The Requisite Jurisdictional Amount To A Legal Certainty.

Interkal's assertion that its first amended complaint cured any defective jurisdictional allegations is erroneous. *Respondent's Brief*, at pps. 9-11. 28 U.S.C. § 1653 "addresses only incorrect statements about jurisdiction that actually exist, and not defects in the jurisdictional facts themselves." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989). The "jurisdictional facts" were defective at the time of commencement of this action, though masked by "jurisdictional allegations" asserting diversity of citizenship and the requisite jurisdictional amount as to Sumitomo and diversity of citizenship and at least supplemental jurisdiction as to Interkal.

Virginia Electric & Power Co. v. Westinghouse Electric Corp, 485 F.2d 78 (4th. Cir. 1973), does not sustain the proposition that Michigan law authorizes an insured to prosecute an action on behalf of a partially subrogated insurer. See: Respondents' Brief, at page 10. *Virginia*

Electric arose under and was governed by Virginia law. *Virginia Electric & Power Co. v Westinghouse Electric Corp.*, 485 F.2d 78, 83 fn.9 (4th. Cir. 1973). Michigan law, the law which governs this case, provides that an insurer which has made a payment on behalf of an insured is subrogated to the rights of the insured and owns the subrogated claim to the extent of the payment. See: *Thornton v. Allstates Ins. Co.*, 425 Mich. 643, 648, 391 N.W. 2d 320 (1986); *Morrow v. Shaw*, 18 Mich.App. 742, 450 N.W. 2d. 96, 99 (Ct.App. 1990). Moreover, in *Virginia Electric*, an express subrogation/collection agreement entered into between the insured and insurer prior to the commencement of the action authorized the insured to prosecute the action in the insurer's name subject to the insurer's control. No such agreement existed between Interkal and its insurer prior to the commencement of the instant action. Sumitomo sued in its own name to recover the alleged damages on a claim it owned and Interkal sued in its own name to recover alleged losses not reimbursed by Sumitomo. Indeed, even the amended complaint does not assert that Interkal is the assignee of Sumitomo's subrogation claim. Accordingly, the amendment allowed by the district court does not cure a defective "allegation of a jurisdictional fact," rather, it asserts a new set of "jurisdictional facts."

B. The Facts Of This Case Render This Case An Appropriate Example of An Inadequate Jurisdictional Amount Resulting From A Prepleading Deficiency To A Legal Certainty.

The original complaint named both Interkal, Inc. and Sumitomo Marine Management (U.S.A.), Inc. as plaintiffs. Pet. App. A40. The complaint asserted that Interkal was a "Michigan corporation with its principal place of business located in Kalamazoo, Michigan...." Pet. App. A40; and, "UIS... is a New York corporation with its principal place of business located in New York, New York..." Pet. App. A41. As to Sumitomo, plaintiffs' original complaint asserted:

> Sumitomo is a New Jersey corporation with its principal place of business located in Warren, New Jersey. It is the insurance company that provided a policy of liability insurance to Interkal for an alleged bleacher collapse that occurred at McDonough High School in Charles County, Maryland on or about September 9, 1988 and is subrogated to the claim of Interkal to the full extent of its payments as enumerated below. Under Rule 17(a) of the Federal rules of Civil Procedure, Sumitomo is a real party in interest and is entitled to prosecute its claim. Pet. App. A40.

The complaint alleged that Sumitomo sought at least $75,000.00 to reimburse legal fees incurred in the defense of Interkal in the underlying action. Pet. App. A41. As to Interkal's damages, the complaint asserted:

> As a result of the failure and refusal of UIS to defend and indemnify Interkal in connection with the Charles County, Maryland bleacher cases referred to above, Interkal has incurred attorneys fees and expenses in the amount of $22,297.52 in assisting UIS and Sumitomo under the terms of the Agreement, notwithstanding UIS's breach of the Agreement. Also, Interkal incurred in-house expense in the amount of $5,100.00 in fabricating and shipping a demonstration bleacher for use at trial in Maryland which should be reimbursed by UIS under the terms of the Agreement. Finally, the refusal of UIS to defend and indemnify Interkal, has, on information and belief, resulted in a significant increase in its insurance premiums which increase is expected to continue into the future regardless of the outcome of this litigation. Pet. App. A48-A49.

Plaintiffs' original complaint *alleged* facts showing complete diversity of citizenship among the parties and more than $50,000.00 in damages to Sumitomo. Also, the complaint asserted jurisdiction over Interkal's claim which was supplemental to the jurisdiction over Sumitomo's action, notwithstanding that the *facts* Interkal asserted amounted to less than $50,000.00 in damages in to Interkal. The original complaint makes no mention of any insurer other than Sumitomo Marine Management (U.S.A.), Inc. The original complaint does not assert that Sumitomo Marine Management (U.S.A, Inc.) is a representative of some other insurer. The complaint does not assert that Interkal is suing in any representative capacity. Rather, the original complaint properly asserts that, as a partially subrogated insurer,

Sumitomo is suing in its own name for that part of a claim that it owns. See generally: *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-381, 70 S.Ct. 207, 94 L.Ed.171 (1949); *Krueger v. Cartwright*, 996 F.2d. 928, 931-932 (7th Cir. 1993).

Immediately upon discovery of the defects in the jurisdictional facts, at the start of trial, UIS challenged federal subject matter jurisdiction over this action. Pet. App. A22, A27, A28. Upon discovery that Sumitomo had falsely plead the status of its corporate citizenship and that incomplete diversity of citizenship existed, the question whether Interkal had plead or could prove damages in excess of $50,000.00 ripened. Until that time, just several days before trial commenced, subject matter jurisdiction over Interkal's claim was supplemental to the jurisdiction apparently existing over Sumitomo's claims, even if Interkal's damages were less than $50,000.00. 28 U.S.C. § 1367(a) Excluding the claim for "increased insurance premiums," Interkal asserted only $27,397.52 in damages in its own right. Pet.App. A48-A49. Having appended the writing expressing the parties' bargain to the complaint, Pet. App. A53-A83, jurisdiction now depended on whether the terms of the seller's indemnity, as expressed in paragraph 22, contemplated recovery of "increased insurance premiums" as an element of damage as a result of a breach by seller. Pet. App. A77-A78. The district court determined that the terms of paragraph 22 are unambiguous, Pet. App. 100, and that recovery of "increased insurance premiums "(was) not within the contemplation of the parties' agreement in fact as expressed in the 1981 asset purchase agreement..." Pet. App. A38. Accordingly, Interkal's provable damages at the time of filing the original complaint were less than $50,000.00 to a "legal certainty." Michigan law, which governs this action, provides that application of the "foreseeable consequences" limitation on

the recovery of contract damages to the terms of an unambiguous writing presents only a question of law. See: *Isagaholian v Transamerica Ins. Co*, 208 Mich. App. 9, 17, 527 N.W.2d. 13, 14 (1994). Moreover, none of the cases on which Interkal relies to recover "increased insurance premiums" as an element of damage either arose under Michigan law, or involved a challenge to the recovery of this element under the "foreseeable consequences" limitation on recovery of contract damages. Respondent's Brief, at page 17, citing to: *Williams Enterprises, Inc. v. Straight Manufacturing & Welding, Inc.*, 728 F.Supp. 12 (D.C. 1990), *aff'd in part and remanded in part on other grounds*, 938 F. 2d 230 (D.C. Cir. 1991); *Continental Cablevision, Inc. v. Storer Broadcasting Co.*, 653 F. Supp. 451 (D. Mass. 1986). Where, as here, the 'law gives the rule, the legal cause of action and not the plaintiff's demand must be regarded." *McNutt v. General Motors Acceptance Corp*, 298 U.S. 178, 182-183, 56 S.Ct. 780, 80 L.Ed 1135 (1936). Accordingly, at the time of filing this action, Interkal's provable damages were less than $50,000.00 as a matter of law. Indeed, at trial Interkal proved only $20,005.07 in damages own its own claims. Pet. App. A11-A12. Since Interkal could not rely on supplemental jurisdiction under 28 U.S.C. § 1367(a) and since its own damages were less than the jurisdictional minimum to a legal certainty both as a matter of pleading and proof, this action should have been dismissed for want of federal subject matter jurisdiction.

II. JURISDICTION DID NOT EXIST AT EITHER THE COMMENCEMENT OF THE ACTION OR AT THE TIME OF FINAL JUDGMENT.

Neither *Caterpillar, Inc. v Lewis*, 519 U.S. ___, 117

S.Ct. 467. 136 L.Ed.2d 437 (1996) nor *Newman-Green, Inc. v Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) save the jurisdictional defects arising from Sumitomo's misrepresentation of citizenship or Interkal's lack of damages exceeding the jurisdictional minimum in its own right. Neither *Caterpillar* nor *Newman-Green* hold that where jurisdiction is in fact lacking as to all plaintiffs at the time of commencement of an action in a federal forum, subsequent events can vest jurisdiction on a "relation back" theory. In both *Caterpillar* and *Newman-Green* dispensable, non diverse parties whose lack of diversity had been overlooked at the commencement of the action were dropped to preserve jurisdiction. Considerations of efficiency, finality and economy cannot override defects in jurisdictional facts which preclude federal subject matter jurisdiction at the inception of an action.

CONCLUSION

This case squarely raises an important question governing the exercise of federal subject matter jurisdiction in cases where damages are based on contract: Where governing common law as applied to express contract terms precludes a plaintiff who invokes federal subject matter jurisdiction from recovering an amount in excess of the specified jurisdictional minimum, must the action be dismissed for want of subject matter jurisdiction?

St. Paul Mercury Indemnity Co. v. Red-Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938) provides that if from either the allegations of a complaint, or "from the proofs at trial, the court is satisfied to...a certainty that plaintiff never was entitled to recover (the minimum amount required to sustain federal subject matter jurisdiction),...the suit will be dismissed." *Id*, at 303 U.S. at 289. Here, application of the

"foreseeable consequences" limitation on recovery of contract damages to the allegations of Interkal's complaint, which incorporated the terms of the agreement at issue, and application of the same rule to plaintiff's proofs at trial, resulted in the conclusion that Interkal lacked damages in its own right which exceeded the jurisdictional minimum specified by 28 U.S.C. § 1331(a) as a matter of law. Accordingly, since Sumitomo and UIS were non-diverse parties and since, as a matter of law, Interkal lacked damages necessary to support the claimed exercise of subject matter jurisdiction, UIS's motion to dismiss for lack of federal subject matter jurisdiction should have been granted.

UIS respectfully requests that this petition be granted and that a writ of certiorari issue to the court of appeals below.

Dated at Milwaukee, Wisconsin this 15th day of April, 1998.

/s/_____
Edward A. Hannan
Counsel of Record
Hannan, Siesennop & Sullivan
200 North Jefferson Street
Milwaukee, WI 53202

Additional Counsel:

Richard J. McClear
Dykema Gossett
400 Renaissance Center
Detroit, MI 48243-1668